[magistrate judge] to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's [magistrate judge's] order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate [magistrate judge] to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate [magistrate judge] shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the

court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [magistrate judge]. The judge may also receive further evidence or recommit the matter to the magistrate [magistrate judge] with instructions. 28 U.S.C. § 636.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit upholding a decision of the district court dismissing the Petitioner's civil action brought under 42 U.S.C. § 1983.

(a) Petitioner believes the decision of the Court of Appeals conflicts with prior decisions of this Court and other circuits holding that a federal court may not exercise its inherent power in a manner that conflicts with Constitutional and statutory provisions. Here, the Court of Appeals denied Due Process to the Petitioner in its arbitrary refusal to apply an exception to its waiver rule. The issue of how appellate courts must apply exceptions to their waiver rules is an issue previously reserved by this Court.

(b) The district court below committed plain error in finding the Petitioner's former attorney had apparent authority to enter into the settlement agreement where controlling precedent in the state court of last resort holds that attorneys do not have apparent authority to compromise a suit.

(c) The Court of Appeals acted in direct conflict with prior holdings of this Court and with *Federal Rule of Civil Procedure* 52(a) as it reviewed the record *de novo* and made its own factual findings. This decision sets a dangerous precedent for appellate courts in overreaching in the scope of their authority to review factual findings under *Rule* 52.

This case arose when Petitioner's son, Torris Harris, suffered death by suffocation at the hands of five City of Chattanooga police officers and two private citizens during a traffic stop.

Petitioner brought suit pursuant to 42 U.S.C. § 1983. Sometime in or around December of 2003, Ms. Harris' former counsel made a demand to the City of Chattanooga to settle the case for one-hundred thousand dollars ($100,000.00). Counsel for the City of Chattanooga responded with a counter-offer of twenty-eight thousand five-hundred dollars ($28,500.00), and, in a December 18, 2003 letter, Petitioner's former counsel accepted the offer. On or about January 1, 2004, Ms. Harris advised her former counsel that she would not accept the offer, and he wrote to the Defendants advising them that she rejected their offer.

Afterward, the Defendants filed various motions to enforce the purported settlement agreement. The motions were referred to the magistrate judge for an evidentiary hearing, and on February 11, 2004, the magistrate issued a Report and Recommendation, recommending that the District Court enforce the purported agreement. The magistrate found Petitioner did not understand the terms of the settlement agreement. (App. at 25a). The magistrate further found Petitioner's former counsel accepted the settlement on her behalf, finding he had apparent authority to do so, and basing this apparent authority solely on his status as counsel of record for Petitioner. (App. 25a). This finding directly contradicts applicable state law holding attorneys do not have apparent authority to settle a suit, and cannot comprise a matter without the express authority of the client.

On March 3, 2004, the District Court entered an Order adopting the Report and Recommendation. Appellant's former

counsel moved to withdraw on March 14, 2004, and on March 18, 2004, he delivered documents, including the Report and Recommendation and Order, to Petitioner. On March 23, 2004, Petitioner, *pro se*, filed her objections to the Report and Recommendation and motion for reconsideration of the Order adopting the Report and Recommendation.

The District Court considered the objections and motion of the Plaintiff, and denied the same under a *Fed. R. Civ. P.* 60(b) standard in a Memorandum and Order, both dated May 14, 2004.

The issue of the lack of authority of Petitioner's former attorney to comprise the suit on her behalf was properly raised below in Petitioner's objections and motion for reconsideration, and on appeal.

In its opinion, the Court of Appeals held that by failing to timely object to the Magistrate's Report and Recommendation within ten days, the Petitioner waived her right to appeal. In so holding, however, the Court of Appeals ignored a long-standing exception to its waiver rule, which allows appeal where the District Court entertains a late-filed objection. The Court of Appeals premised its departure from this rule on the fact that the District Court viewed the Petitioner's objections under a *Fed.R. Civ. P.* 60 standard, despite there having been at least one prior Sixth Circuit opinion allowing appeal where a late objection was viewed by the District Court under a *Rule* 60 standard.

The Court of Appeals then reviewed the record *de novo* and held that the Petitioner accepted the settlement – a finding not reached by the district court. By reviewing the record *de novo* and making its own factual findings, the Court of

Appeals overstepped the bounds of its authority under *Federal Rule of Civil Procedure* 52(a).

The Sixth Circuit denied Petitioner's request for rehearing and for rehearing en banc without opinion.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari Because The Decision Below Conflicts With Decisions Of This Court And Other Circuits Holding That A Federal Court May Not Exercise Its Supervisory Power In A Way That Conflicts With Constitutional And Statutory Provisions.

A. The Waiver Rule at Issue.

At issue here is a rule, adopted by the Sixth Circuit in *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981), conditioning appeal upon a party filing objections to a magistrate's report within ten days as provided for in 28 U.S.C. § 636 (b)(1).

In *Thomas v. Arn*, 474 U.S. 140 (1985), this Court considered the Sixth Circuit's waiver rule and held that "a court of appeals may adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate's recommendation, upon the filing of objections with the district court identifying those issues on which further review is desired. Such a rule, at least when it incorporates clear notice to the litigants and an opportunity to seek an extension of time for filing objections, is a valid exercise of the supervisory power that does not violate either the Federal Magistrate's Act of the Constitution." *Id.* at 155.

This Court noted that because the waiver rule approved by the Court was a nonjurisdictional waiver provision, default could be excused "in the interests of justice," referencing in a footnote *Fed. R. of Crim. Proc.* 52(b), which states that a court may correct plain error despite the failure of a party to object. 474 U.S. at 155.

B. Certiorari is Warranted Where This Court Expressly Reserved the Issue of How Appellate Courts Must Apply Exceptions to the Waiver Rule and Where There is a Split Among the Circuits in Their Application of Exceptions.

In *Thomas*, the Court expressly reserved the issue of how appellate courts must apply exceptions to their waiver rules, stating, "[w]e need not decide at this time what standards the courts of appeals must apply in considering exceptions to their waiver rules." 474 U.S. at 155.

A grant of certiorari by this Court is appropriate where a decision of the court of appeals is predicated upon a point expressly reserved or left undecided in prior decisions of this Court. See, *American Textile Mfrs. Institute v. Donovan*, 452 U.S. 490, 495 (1981); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 161-62 (1999).

Since the decision in *Thomas*, there has been a definitive split among the circuits in considering exceptions to their waiver rules.

A grant of certiorari is also appropriate where there is a conflict between decisions of courts of appeals on the same matter. *Supreme Court Rule* 10(a); see also, *Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (certiorari granted where

circuits disagreed "because uniformity among federal courts is important on questions of this order"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (certiorari granted "to resolve a conflict among the Circuits on the appealability question" as to certain district court decisions); *Marks v. United States*, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits").

C. An Appellate Court's Supervisory Power is Invalid Where It Conflicts With Constitutional and Statutory Provisions.

In *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988), this Court held that a federal court may not invoke its inherent power to circumvent the harmless error inquiry of *Fed. R. Crim. P.* 52, and observed, "[i]t follows that Rule 52 is, in every pertinent respect, as binding as any statute enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."

In *United States v. Paynor*, 447 U.S. 727 (1980), this Court ruled that the district court erred when it invoked its inherent power to suppress evidence even though an illegal search did not violate the accused's Fourth Amendment rights, finding that, "[w]ere we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. We hold that the supervisory power does not extend so far." *Id.* at 737; see also, *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958) (rejecting the appellate court's reliance on inherent power to uphold a dismissal of a complaint for failure to comply with a production order, holding, "there are constitutional

limitations upon the power of courts, even in the aid of their own valid purposes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.").

Indeed, in *Thomas,* 474 U.S. 140, where this Court allowed the waiver rule at issue here, this Court observed, "[e]ven a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions. A contrary result 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.'" Id. at 148 (citing *Payner,* 447 U.S. at 737).

The discord among the circuits in considering exceptions to their waiver rules, and as applied by the Sixth Circuit in the manner in which it considers exceptions to its waiver rule, has had the practical effect of denying Due Process to the Petitioner in the instant case.

D. The Sixth Circuit's Waiver Exceptions.

The Sixth Circuit excuses the waiver provision "in the interest of justice". *Kelly v. Withrow*, 25 F.3d 363, 366 (6th Cir. 1994), cert. denied, 513 U.S. 1061 (1994); see also, *Kent v. Johnson*, 821 F.2d 1220, 1223 (6th Cir. 1987).

Compliance is also excused in the Sixth Circuit when a district court considers untimely objections. *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983). In *Patterson*, the Court concluded that, "when written objections to a magistrate's report are tendered beyond the 10 day period of 28 U.S.C. § 636(b)(1), but are nevertheless filed and considered by the district court, the criteria identified in *Walters* in justification of the waiver rule promulgated therein

dissipate and the rule will not apply to bar appellate review." *Id.* at 286; see also, *Kent*, 821 F.2d at 1223.

The underlying rationale, as explained by the Court in *Patterson* is that, "[t]he district court, rather than the magistrate, is charged with the ultimate responsibility of properly adjudicating the Article III controversy before it. Accordingly, the district court may place upon the magistrate's recommendation such reliance as is warranted through the 'exercise of sound judicial discretion.'" *Id. at* 287. (citation omitted).

In *Kent*, 821 F.2d 1220, the court decided to entertain the appeal "in the interests of justice" because the appellant did not receive the report and recommendation until the eleventh day, holding that, "[t]he interests of justice must be weighed on a case by case basis." *Id.*

E. The Split Among the Circuits in Applying Exceptions to Their Waiver Rules.[1]

Like the Sixth Circuit, many other courts have held that where a district court considers a late-filed objection, the court's waiver rule does not apply. See, *United States v. Robinson*, 30 F.3d 774, 777 (7th Cir. 1994) (holding that its appellate waiver rule would not apply when untimely objections are not "egregiously late" and the opposing party

[1] The Third and Ninth Circuits do not apply an appellate waiver rule to accepted unobjected-to proposed legal conclusions in a magistrate judge's report. See, *Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir.), cert. denied, 484 U.S. 837 (1987); *Flaten v. Secretary of Health & Human Servs.*, 44 F.3d 1453, 1458 (9th Cir. 1995). The First Circuit has not applied any exceptions to its waiver rule. See, *Davet v. Maccarone*, 973 F.2d 22, 31 (1st Cir. 1992).

has not been prejudiced); see also, *Nabors v. United States*, 929 F.2d 354, 355 (8th Cir. 1990) (holding time was "implicitly enlarged where district court considered untimely objections."); *Grandison v. Moore*, 786 F.2d 146 (3rd Cir. 1986) (remanding trial court's order adopting a magistrate's findings and conclusions in order for district court to consider whether plaintiff adequately justified delay in filing objections).

The Second Circuit has created an exception for *pro se* litigants unless the magistrate's report "explicitly states" that failure to object to the report within ten days will preclude appellate review and specifically cites 28 U.S.C. § 636(b)(1), *Fed. R. Civ. P.* 72, 6(a) and 6(e). *F.D.I.C. v. Hillcrest Associates*, 66 F.3d 566, 569 (2nd Cir. 1995).

Like the Second Circuit, in the Tenth and Fourth Circuits, the rule does not apply to a *pro se* litigant's failure to object when the magistrate's order does not apprise the *pro se* litigant of the consequences of a failure to object. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985). The Tenth Circuit also holds the waiver rule "need not be applied when the interests of justice so dictate." *Moore*, 950 F.2d at 659.

The Fifth Circuit and Eighth Circuits have a "plain error" exception. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-1429 (5th Cir. 1996); *Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990). The Eleventh Circuit reviews accepted unobjected-to proposed factual findings for "plain error or manifest injustice." See, *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

F. In this Case, the Arbitrary Application of the Waiver Rule and Exceptions by the Court of Appeals Denied Petitioner Due Process.

In *Thomas*, 474 U.S. at 146, this Court stated that, "[t]he Sixth Circuit has also shown that its [waiver] rule is not jurisdictional by excusing the procedural default in a recent case. See *Patterson v. Mintzes*, supra (considering appeal on merits despite pro se litigant's late filing of objections). We therefore conclude that neither the intent nor the practical effect of the Sixth Circuit's waiver rule is to restrict the court's own jurisdiction."

In the instant case, the Court of Appeals refused Petitioner's appeal, disregarding the court's own exception to its waiver rule, as explained in *Patterson v. Mintzes*, where appeal is allowed if the district court entertains late-filed objections. While recognizing the district court did, in fact, entertain the Petitioner's late-filed objections, the court distinguished *Patterson*, stating, "[t]here the district court considered the untimely objections *on the merits*. *Id.* By contrast, in this case, the district court considered this matter under Rule 60(b) only, not on the merits." (App. at 9a-10a).

However, the Sixth Circuit previously held in *Dunn v. State of Ohio*, 42 F.3d 1388 (6th Cir. 1994), that it would consider an appeal and not apply the waiver rule based upon the *Patterson* exception where, as in this case, the district court considered a late-filed objection under a *Fed. R. Civ. P.* 60(b) standard.

The Court of Appeals' refusal to apply the *Patterson* exception to its waiver rule had the effect of denying the Petitioner her statutory right of appeal. Furthermore, where the court applied its late-filed objection exception in *Dunn* but

not in the instant case, where both cases involved objections reviewed under a *Rule* 60 standard, the refusal to hear the Petitioner's appeal was an arbitrary denial of Due Process.

The Due Process Clause of the Fifth Amendment asserts that no person shall "be deprived of life, liberty, or property without due process of law." The Constitution does not create property interests but instead extends various procedural safeguards to certain interests "that stem from an independent source such as a [federal] law." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). A claim of entitlement under federal law, to be enforceable, must be derived from statute or legal rule or through a mutual understanding. *Perry v. Sinderman,* 408 U.S. 493, 601-602 (1972).

When presented with a Due Process challenge, a court must determine, first, whether there has been a deprivation of a property interest, and, if so, what process is due. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

Petitioner's entitlement here is clear because Petitioner's right to appeal is vested in 28 U.S.C. § 1291. Accordingly, because Petitioner possessed a cognizable property interest within the terms of the Fifth Amendment, the Constitution obligated the district court to afford her procedural due process before depriving her of her property in denying her the opportunity to have her appeal heard.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (U.S. 1982), this Court held that a party's Due Process rights were violated where state arbitrarily failed to convene a hearing within limitations period, thus extinguishing the claim.

By applying an exception to the waiver rule in *Dunn v. State of Ohio*, where the late-objection was considered under a *Rule* 60 standard, but refusing to do so in the case at bar, without distinction, the Sixth Circuit is arbitrarily applying its waiver rule and exceptions, and thus denying the Petitioner her statutory right to appeal.[2]

Where there is discord among the decisions of the circuit courts of appeal, and within the Sixth Circuit, in how the courts apply exceptions to their waiver rules, such that the Due Process rights of litigants is being eviscerated by the arbitrary and dissonant application by the appellate courts, this Court should review the issue it previously reserved, of "what standards the courts of appeals *must* apply in considering exceptions to their waiver rules." 474 U.S. at 155 n.15 (emphasis added).

II. This Court Should Grant Certiorari Where The District Court Committed Plain Error.

A grant of certiorari is appropriate here, pursuant to Supreme Court Rule 10(a), because the district court decision below directly conflicts with the controlling authority from the state court of last resort.

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[2] Additionally, as noted above, the Second, Fourth and Tenth Circuits all provide an exception to their waiver rule for *pro se* litigants who do not receive adequate notice of waiver. Here, Petitioner's former attorney withdrew his representation on March 14, 2004, and Petitioner filed her objections, *pro se*, on March 23, 2004, just one day outside the ten days provided under *Fed. R. Civ. P.* 59 for review on the merits of the court's March 3, 2004 Order (when considered with *Fed. R. Civ. P.* 6 time computation), and certainly within ten days of Petitioner's receipt of the decisions from her former attorney on March 18, 2004.

Additionally, the refusal by the Court of Appeals to address the issue of whether the district court committed plain error, and instead reviewing the case *de novo* (as discussed in section III, *infra*.) is a clear departure from the accepted and usual course of judicial proceedings, and a sanctioning of the district court's own such departure.

This Court has, on many occasions, granted certiorari where there is a question of whether a doubtful determination or plain error was committed below. See, *Kyles v. Whitley*, 514 U.S. 419, 422 (1995); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 336 (1982); *New York Transit Authority v. Beazer*, 440 U.S. 568, 571 (1979); *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 136 (1968); *Williams v. Lee*, 358 U.S. 217, 218 (1959).

In this case, there was plain error committed by the District Court in its finding that the Petitioner's former attorney had apparent authority to settle the lawsuit on her behalf. In determining the enforceability of a settlement agreement, the state law of the state where the purported agreement was entered into is applicable. *See, Zink v. GE Capital Assurance Co.*, 73 Fed. Appx. 858, 861 (6th Cir. 2003). In the case at bar, the alleged Settlement Agreement was entered into in Tennessee, and as such, Tennessee law must apply.

The District Court found the Petitioner's former attorney was clothed with apparent authority. However, Tennessee law leaves attorneys naked as to such authority. It is the client who holds the authority as to whether to settle a matter, and it is the client who must expressly give such authority.

In *Absar v. Jones*, 833 S.W.2d 86, 89-90 (Tenn. Ct. App. 1992), the court held that, "[t]he general rule in Tennessee is

that an attorney cannot surrender substantial rights of a client, including agreeing to dismissal of litigation which permanently bars a client from pursuing his claim, without the express authority of the client." (citing, *Long v. Kirby-Smith*, 292 S.W.2d 216, 222 (Tenn. 1956); *Davis v. Home Insurance Co.*, 155 S.W. 131, 133 (Tenn. 1913)).

In the instant case, the District Court held that the Petitioner never understood the terms of the agreement, holding "the plaintiff herself testified she thought the $28,500.00 was simply a first installment for $100,000.00. This mistaken understanding of the settlement amount apparently came from her own attorney's settlement demand, which was rejected, of $100,000.00." (App. at 25a). The court found that it was the Petitioner's former attorney who accepted the settlement on her behalf, holding that, "the plaintiff clothed her attorney to enter into a settlement on her behalf of all her claims against defendants." (App. at 26a). The opinion of the Magistrate was plain error because the applicable law holds that attorneys do not have apparent authority to settle matters, and that the client must give their express authority to settle a case. As such, the district court below committed plain error in finding that the Petitioner's former counsel had apparent authority to compromise this suit on her behalf.[3]

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[3] The district court also committed plain error in finding that the purported Settlement Agreement was met on all material terms as it held, "[Petitioner's former attorney] entered into an agreement with the defendants in which the material but simple terms of the agreement were set." (App. at 25a). Here, the magistrate's analysis stopped with finding the Petitioner's former attorney had apparent authority to settle the suit – which was plain error.

Without the intervention of this Court, the plain error of the court below will lead to a miscarriage of justice in the termination of Petitioner's suit in an unjust compromise to which she never assented.

III. This Court Should Grant Certiorari Where The Court Of Appeals Acted Contrary To Precedent Of This Court And Overstepped The Bounds Of Its Duty Under *Federal Rule of Civil Procedure* 52(a) In Weighing The Evidence *De Novo* And Making Factual Findings.

In the instant case, the Court of Appeals, despite its finding as to waiver, considered the case on its merits, finding against the Petitioner.[4] In its review of the case, however, the court blatantly overstepped the bounds of its review, in considering the record *de novo* and making factual determinations contrary to that of the district court.[5]

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[4] The court stated that, "[e]ven if we consider the merits of Plaintiff's claims, she cannot prevail." (App. at 10a). The Court of Appeals then made specific, binding holdings in this case. The character of its review makes clear these findings were not dicta. Even if this Court considers the review of the record by the Court of Appeals to be dicta, the deliberate and unrestrained review of the record, *de novo*, so far departed from the accepted and usual course of judicial proceedings that it warrants review by this Court.

[5] The panel also improperly found that the Appellant never raised the issue "of the proper law to be applied" below. This is semantics without substance. Taken to its logical conclusion, this holding would throw into question every case in every federal court. It is preposterous to require that a litigant must first raise, as a separate issue, whether the court must apply the proper law. This holding is a clear departure from the accepted and usual course of judicial proceedings, such that certiorari is warranted under

Supreme Court Rule 10(c) states that certiorari may be granted where a "United States Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court," and the Court has on many occasions undertaken consideration of a case where the decision of a court of appeals appears to have misapplied, misconstrued or misconceived prior precedent of this Court. See, *Elder v. Holloway*, 510 U.S. 510, 515 (1994); *Schlude v. Commissioner*, 372 U.S. 128, 130 (1968); *Wilkinson v. United States*, 365 U.S. 399, 401 (1961); *Upshaw v. United States*, 335 U.S. 410 (1948); *McCandles v. Furlaud*, 296 U.S. 140 (1935).

Federal Rule of Civil Procedure 52(a) provides that, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[6]

Supreme Court Rule 10(a). A court must always apply the proper law to the substantive issue before it. In the instant case, the Petitioner properly raised the issue of apparent authority, which was the issue below. Application of Tennessee law simply provides the correct solution to the issue. The issue was properly raised below by the appellant in her objections that were considered by the District Court, and on appeal.

[6] Additionally, the Sixth Circuit holds that the proper standard of review in deciding whether to affirm the district court's decision to uphold a settlement agreement [which was the issue below], is for the Court of Appeals to review the district court's factual findings for clear error and review *de novo* the district court's conclusions of law. *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995).

This Court has clearly and consistently held that, "[t]he reviewing court oversteps the bounds of its duty under *Fed. R. Civ. P.* 52(a) if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*'" *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 572 (1983) (citing *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)).

"[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Id.* (citing *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964); *United States* v. *Marine Bancorporation*, 418 U.S. 602, 615, n. 13 (1974)).

In the instant case, the decision of the Court of Appeals is in direct conflict with prior holdings of this Court, and with *Fed. R. Civ. P.* 52(a), as the Court of Appeals reviewed the facts *de novo* and came to a conclusion not reached by the district court.

The Magistrate below held that the Petitioner never understood the terms of the settlement agreement, holding, that the Petitioner had a "mistaken understanding of the settlement amount." (App. at 25a). After finding that the Petitioner did not understand the terms of the agreement, the Magistrate held that, "the plaintiff clothed her attorney with apparent authority to enter into a settlement on her behalf." (App. at 26a).

In its opinion, the Court of Appeals reviewed *de novo* the district court's factual finding that the Petitioner did not

understand the terms of the agreement, holding that, "*in this case, a review of her testimony before the magistrate reflects that* the Plaintiff accepted the offer of $28,500 and later reversed her acceptance," and further held, "*it is clear from the record that* Plaintiff initially gave [her former counsel] express authority to settle the matter, and then later reversed her position." (App. at 12a, 14a) (emphasis added). By making factual findings not made by the district court, the Court of Appeals unabashedly reviewed the record *de novo*, with complete disregard for standard under *Fed. R. Civ. P.* 52(a) and prior holdings of this Court.

Review under *Fed. R. Civ. P.* 52(a), "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 572.

By making a finding that the Appellant accepted the offer, which finding the District Court *never* made, the panel abandoned the proper standard of review, and set a dangerous precedent of inserting itself into the role of the district court trier of fact. As such, this Court should reverse the holdings of the Court of Appeals that were based upon an improper *de novo* review of the record.

CONCLUSION

For the reasons set out, this Court should grant the petition for writ of certiorari, reverse the judgment of the Court of Appeals and remand for trial.

Respectfully submitted,

Amelia C. Roberts
707 Georgia Avenue, Suite 401
Chattanooga, TN 37402
Telephone (423) 266-8400
Facsimile (423) 265-8055
Counsel for Petitioner

APPENDIX A

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 04-5421

[Filed September 29, 2005]

TONYA HARRIS, an Administratrix of the Estate of decedent Torris Harris Plaintiff-Appellant,	)
v.	)
CITY OF CHATTANOOGA, et al., Defendants-Appellees.	)

ORDER

BEFORE: SUHRHEINRICH, BATCHELDER, and GIBSON,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 04-5421

[Filed June 15, 2005]

TONYA HARRIS, an Administratrix of the Estate of decedent Torris Harris,
Plaintiff-Appellant;

v.

CITY OF CHATTANOOGA; JUSTIN MCCOMMON, MARTIN PENNY, CHRIS SMITH, DAVID ALLEN, MARK SMELTZER, City of Chattanooga Police Officers, in Their Official and Individual Capacities; CHARLES R. KINSEY, CHRISTOPHER L. GAYNOR, Private Citizens in Their Capacity as Agents for the City of Chattanooga and in their Individual Capacities,
Defendants-Appellees.

OPINION

SUHRHEINRICH, J

Plaintiff Tonya Harris, individually and as administratrix for the estate of Torris Harris, appeals from the order of the district court granting Defendants' motion to enforce a settlement agreement. We AFFIRM.

I.

This action arises out of the suffocation death of Torris Harris, Tonya Harris's son, after an altercation with five Chattanooga police officers, Justin McCommon, Martin Penny, Chris Smith, David Allen, Mark Smeltzer, and two private citizens, Charles Kinsey, and Christopher Gaynor. On December 26, 2001, Defendants initiated a traffic stop of Torris Harris. Harris exited the vehicle, and the officers chased him. After they caught him, all Defendants restrained him. Torris died following the struggle.

On December 26, 2002, Plaintiff filed a complaint against the City of Chattanooga, five City of Chattanooga police officers, and two private citizens, alleging violations of 42 U.S.C. §§ 1983, 1985. On November 14, 2003, Harris's former counsel, Robin Ruben Flores, made a written demand to the City of Chattanooga to settle the case for $100,000. On December 18, 2003, Flores sent by facsimile a letter to Phil Noblett. The letter is entitled "Acceptance of Offer to Settle" and states as follows:

> Thank you for your attention to this case. As we discussed yesterday, December 17, via telephone, my client has accepted your offer on behalf of your client, the City of Chattanooga, to settle this matter for a sum

> of twenty-eight thousand five hundred dollars ($28,500.00). I assume that your client will also pay all court costs. I further assume that this amount shall constitute a settlement of all claims associated with this matter, state and federal, present and future.

This letter was copied to Ms. Tonya Harris, Lee Davis, Esq., Johnny Houston, Esq., W. Jeffrey Hollingsworth, Esq., John T. Rice, Esq.

On December 18, 2004, Noblett sent the following letter to Flores:

> Pursuant to our telephone conversation yesterday afternoon, this letter will confirm that your client has agreed to settle her claims against the City of Chattanooga and all other parties regarding the death of Torris Harris in the amount of $28,500.00. It is my understanding that this settlement will resolve all outstanding claims that your client has filed in federal court and in state court concerning this matter. Attached with this letter you will find, pursuant to our discussion, an Order of Dismissal for both lawsuits which will be filed in federal court and in Circuit Court and a Release of All Claims which I have prepared reflecting this settlement.

A copy of this letter was sent to attorneys Lee Davis, Johnny D. Houston, Jeffrey Hollingsworth, and John T. Rice. As noted in the letter, enclosed were a proposed "AGREED ORDER OF DISMISSAL" for the state action and a proposed "AGREED ORDER OF DISMISSAL" for the federal action. These proposed orders would dismiss both causes of action with prejudice as to all defendants. Also enclosed was a proposed "RELEASE OF ALL CLAIMS" releasing and

forever discharging all claims against the defendants in consideration of the sum of $28,500.00.

Attorney Flores stipulated to the correctness of both letters. (JA. 204). In a letter dated December 22, 2003, postponing a hearing on a motion to compel filed by defendant Kinsey, Flores remarked to Attorney John Rice that "as you are probably now aware, my client has accepted an offer to settle the cases in state and federal courts as to all defendants."

On January 1, 2004, Flores sent the following letter to Noblett:

> My client has reversed her position on her acceptance of your client's offer to settle this matter for $ 28,500.00. She now rejects the offer and does not wish to sign the documents you forwarded to my office on December 18, 2003.
>
> Instead, she makes a counter offer to settle for seventy-five thousand dollars ($75,000.00), plus the funeral costs and expense and medical bills we have submitted to you.
>
> I am aware that you are free to file a motion to enforce the settlement Ms. Harris has accepted. However, she now claims that she believed that she was accepting an offer of one hundred thousand dollars.

On January 13, 2004, subsequent to the settlement rejection, Plaintiff filed documents entitled "Motion for Enlargement of Time to Disclose Expert Witnesses," and a "Motion for Enlargement of Time." In the first motion, Plaintiff stated that she "would show that the parties reached

a settlement agreement on or about December 17, 2003, and that Plaintiff's counsel, in anticipation of the settlement, halted all work not associated with finalizing the settlement. Plaintiff would further show that she rejected the settlement in early January."

After receiving notice of rejection of the settlement agreement, Defendants filed motions to enforce the contract of settlement. The matter was referred by the district court to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B)&(C) for a report and recommendation. The magistrate judge conducted an evidentiary hearing on February 3, 2004. The magistrate judge found that

> [t]he evidence adduced in this case unequivocally indicates that the plaintiff hired Attorney Flores as her agent in pursuing her claim against defendants and later in negotiating a settlement of her claims. Flores entered into an agreement with the defendants in which the material but simple terms of the agreement were set: all plaintiff's claims against all defendants arising from her son's death on December 26, 2001, were released and waived for the sum of $28,500.00. There is no evidence to the contrary on that score even though the plaintiff herself testified she thought the $28,500.00 was simply a first installment of a settlement for $100,000. This mistaken understanding of the settlement amount apparently came from her own attorney's settlement demand, which was rejected, of $100,000.00.

In footnote two, the magistrate judge specifically indicated that any objections had to be served and filed within ten days or the right to appeal the district court's order was waived.

None of the parties filed objections. On March 3, 2005, the district court accepted and adopted the magistrate's report, granted Defendants' motion, and entered judgment. Plaintiff filed a letter dated March 23, 2004, more than ten days after the order entered by the magistrate judge, which was treated as a motion for reconsideration. This letter states that on March 12, 2004, Plaintiff terminated Attorney Flores's employment. Plaintiff's motion also requested that the district court to set aside its order adopting the magistrate's report and recommendation. Plaintiff filed a pro se notice of appeal on April 2, 2004.

Flores was allowed to withdraw on April 8, 2004, by order of the magistrate judge. On May 14, 2004, the district court issued an order denying Plaintiff's motion for reconsideration. Because the order was not filed within ten days of the entry of the court's order of summary judgment, the court treated the motion as a Rule 60(b) motion for relief from judgment instead of a Rule 59(e) motion to alter or amend the judgment. The district court held that there were no circumstances justifying relief from judgment under Rule 60(b). The district court stated in relevant part:

> Plaintiff's circumstances, while undoubtedly frustrating and emotional, do not amount to the unusual or extreme situation (sic) contemplated by Rule 60(b)(6). Plaintiff's contentions and representations regarding Attorney Flores' actions and her own state of mind do not call into question either the R&R or the Court's previous Order enforcing the settlement agreement. The Court entered the Order enforcing the settlement agreement upon concurring with Magistrate Judge Carter's conclusion attorney Flores had apparent authority to settle Plaintiff's case on her behalf. Whether or not attorney Flores had

> *actual* authority to do so has no impact on liability as between Plaintiff and the various Defendants. At this point, Plaintiff's only recourse lies in a separate action against attorney Flores.

The district court therefore denied Plaintiff's motion for reconsideration. Plaintiff is currently represented by counsel on appeal.

II.

A.

On appeal, Plaintiff contends that the district court erred in failing to apply Tennessee law to the issue of enforcement of the proposed Settlement Agreement. However, because Plaintiff failed to object timely to the magistrate judge's report and recommendation, despite notice from the magistrate, she waived the right to appeal from the district court's order affirming the magistrate judge's report. *United States v. Campbell*, 261 F.3d 628, 632 (6th Cir. 2001); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *see also Thomas v. Am*, 474 U.S. 140, 144, 155, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985)(affirming constitutionality of Sixth Circuit rule).[1]

---

[1] Relying on *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983), Plaintiff contends that the waiver of her appeal was abrogated by the district court's review of her late filing. In *Patterson*, this Court concluded that "when written objections to a magistrate's report are tendered beyond the 10-day period of 28 U.S.C. § 636(b)(1), but are nevertheless filed and considered by the district court, the criteria identified in *Walters* in justification of the waiver rule promulgated therein dissipate and the rule will not apply to bar appellate review." *Id.* at 286. *Patterson* is distinguishable. There, the district court considered the untimely objections *on the merits*. *Id.* By contrast, in this case, the district court considered this

In short, Plaintiff's failure to timely object to any matters addressed in the magistrate judges report and recommendation constitutes a waiver of these issues on appeal. More to the point, she has waived the three issues presented on appeal: (1) whether the district court erred in [sic]* applying Tennessee law regarding enforcement of the proposed settlement agreement; (2) whether the district court erred in finding Plaintiff's former counsel had "apparent authority to settle lawsuits," and (3) whether the district court erred in finding the proposed settlement agreement had been met on all material terms.

Plaintiff's appeal is also defective because she failed to raise the issue of the proper law to be applied until this appeal. It is well-settled that this Court will not consider arguments raised for the first time on appeal. *See Foster v.*

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matter under Rule 60(b) only, not on the merits.

Because the *Walters* rule is not jurisdictional, it may be excused in two situations. First, issues not raised in an objection may be considered on appeal if the district court addressed them. *Id.*; *Roach v. Chater*, No. 96-5780, 1997 WL 330649, at *2 (6th Cir. June 16, 1997)(order). As noted, the district court did not in this case address the merits. In addition, we may choose not to adhere to the *Walters* rule if exceptional circumstances indicate that it would be in the "interests of justice" to consider the merits. *Kent v. Johnson*, 821 F.2d 1220, 1222-23 (6th Cir. 1987). In this situation, the Supreme Court has suggested that this exception might be applicable where the district court has committed "plain error." *Thomas*, 474 U.S. at 155 & n.15. The record does not support application of the exception here, however.

* The opinion contains a typographical error inasmuch as the question presented was actually, "whether the district court erred *in failing to apply* Tennessee law."

Barilow, 6 F.3d 405, 407 (6th Cir. 1993)(issues presented for the first time on appeal are waived). Even if we consider the merits of Plaintiff's claims, she cannot prevail.

B.

Plaintiff contends that the magistrate judge erred in applying Michigan law instead of Tennessee law in determining whether the settlement agreement was enforceable. In support, she points out that the agreement was entered into in Tennessee. *See Capital Dredge & Dock Corp. v. City of Detroit,* 800 F.2d 525, (6th Cir. 1986); *Zink v. GE Capital Assur. Co.,* 73 Fed. Appx. 858, 861 (6th Cir. 2003)(holding that "the settlement agreement was entered into in Kentucky . . . as a result, Kentucky law governs whether the settlement agreement was enforceable").

As Plaintiff notes, the magistrate judge did not rely upon Tennessee law, but cited two Sixth Circuit opinions, *Capital Dredge & Dock Corp. v. City of Detroit,* 800 F.2d at 530 and *Noga v. Parts Assocs.,* 2000 U.S. App. LEXIS 1937, 2000 WL 178385 (6th Cir. Feb. 8, 2000), which applied Michigan law. She claims that this is problematic because Michigan law holds that when a client hires an attorney and holds him out as counsel representing him in a matter, "the client clothes the attorney with apparent authority to settle claims connected with the matter." *Capital Dredge,* 800 F.2d at 530. By contrast, Tennessee law holds that attorneys do not have apparent authority to settle matters, but rather the client must give express authority to settle a case.

Indeed, in Tennessee law "the general rule . . . is that an attorney cannot surrender substantial rights of a client, including agreeing to dismissal of litigation which permanently bars a client from pursuing his claim, without the

express authority of the client." *Absar v. Jones*, 833 S.W.2d 86, 89-90 (Tenn Ct. App. Jan. 27, 1992)(citations omitted); *see also Austin Powder Co. v. Thompson*, 1995 Tenn. App. LEXIS 42, No. 03A01-9408-CH-00294, 1995 WL 33778 (Tenn. Ct. App. Jan. 27, 1995)(stating that "we adhere to the universal rule that a client's employment of an attorney does not clothe the attorney with authority to compromise and settle [the] client's cause of action, and such authority may not be implied"(internal quotations marks and citation omitted)); *Fort Sanders Reg'l Med. Ctr. v. Collins*, 1992 Tenn. App. LEXIS 667, No. 03A01-9202-00041, 1992WL 184682 (Tenn. Ct. App. Aug. 5, 1992)(same). However, in this case, a review of her testimony before the magistrate judge reflects that Plaintiff accepted the offer of $28,500 and later reversed her acceptance.

Attorney Flores questioned Plaintiff about the settlement as follows:[2]

---

[2] Just prior to this testimony, Plaintiff testified to the following:

> Q: Okay. Tonya, what was your understanding -- What did you understand, from me, the terms of the settlement offer from Mr. Noblett, who is the counsel over here . . . what did you understand the offer was from him that I communicated to you back on December the 16th -- the 17th?
>
> A: 28,500.
>
> Q: 28,500?
>
> A: Yes. But I thought that was coming out of the hundred thousand.
>
> Q: Out of what hundred thousand?

Q: How many times have we met as far as discussing the terms of an offer that we made and an acceptance of the offer; do you recall how many times?

A: Maybe about -- probably about 3 times, maybe...?

Q: About three times?

A: Yeah.

Q: Okay, was that -- where was that? Where were those meetings?

A: Well, two was at the office. And then you called me over the phone and told me about the settlement.

Q: Okay, an acceptance of an offer, do you recall what we discussed about that?

A: The only thing that I remember was to accept the $28,000 because I was losing my house.

A: I thought I had a settlement of a hundred thousand.

Q: What made you think that you had a settlement for a hundred thousand dollars?

A: When we got the letter.

Q: What letter was that?

A: That was the letter that had the hundred thousand on it. And I thought since I was losing my house, that they would just go ahead and take part of that and take it out of the hundred thousand.

Q: Did you feel pressured to accept the $28,000? A: Yes, I did. Yes.

Q: You thought that -- All right. Let's go back to the house issue, to the house issue, Tonya. Why were you getting ready to lose your house? Let me back up a bit, do we agree that your house was in foreclosure?

A: Yeah.

On cross-examination by John Rice, Plaintiff acknowledged that she has a college education. She further admitted that she received a copy of the December 18, 2003 letter, which clearly stated at the top in bold type "Acceptance of Offer to Settle." Plaintiff also stated that she did not call to tell her attorney that the letter was not correct. Plaintiff admitted that she also received the December 22 letter addressed to John Rice confirming the settlement. Finally, Plaintiff admitted to the following:

Q: And when you got these letters, you understood the terms of the settlement, did you not?

A: Yes, I did.

Q: And you later on decided to reject the settlement?

A: Yeah.

From Flores' January 1, 2004 letter, and Plaintiff's own testimony, it is clear from the record that Plaintiff initially gave Flores express authority to settle the matter, and then later reversed her position. By her acceptance of the offer she gave her attorney express authority to accept the offer on her

behalf. Under Tennessee law, where a principal gives an agent express authority to settle a case, either orally or in writing, the principal is bound by the acts of the agent within the scope of authority expressly conferred upon the agent. *S. Ry. v. Pickle,* 138 Tenn. 238, 197 S.W. 675 (Tenn. 1917). As the district court stated at the evidentiary hearing, "I think it's fair to say that if a party directs their lawyer to settle a case, and that is communicated, the fact that a person later on may change their mind about the settlement does not affect the fact that it is settled." In any event, by waiting two weeks before notifying her attorney of her intent to revoke her acceptance of the settlement agreement, Plaintiff ratified the settlement agreement through her silence. *See Austin Powder,* 1995 Tenn. App. LEXIS 42, 1995 WL 33778 at ¶3 (noting that silence can amount to ratification where the party with knowledge of the transaction fails for a reasonable time to protest or dissent). Thus, as the district court held, any dissatisfaction Plaintiff has regarding the settlement can only be directed towards her attorney.

C.

Plaintiff also asserts that the district court erred in finding that the proposed settlement agreement had been met on all material terms, because Plaintiff never understood the most important term, the amount of the settlement. However, as reflected above, Plaintiff testified that she understood the settlement agreement and later decided to reject it.

Plaintiff further alleges that she never understood that negotiations were taking place, and therefore there was never a meeting of the minds between herself and the defendants as to the settlement amount. Again, the foregoing testimony establishes that Plaintiff was aware of the fact that she was accepting an offer of $28,500, and that she was doing so

because she was faced with the potential of losing her home. The record also clearly shows that Plaintiff received copies of all correspondence from her attorney relating to the acceptance of the written settlement offer made by the City of Chattanooga on December 17, 2003, and that she was capable of understanding them.

In sum, there was clearly a meeting of the minds as to the essential terms of the contract on December 18, 2003, such that a binding contract under Tennessee law was created. The district court did not err in enforcing it, and did not err in finding there was no adequate basis for relief under Rule 60(b).

III.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
TENNESSEE AT CHATTANOOGA

Case No. 1:20-CV-385

[Filed March 3, 2004]

TONYA HARRIS,	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF CHATTANOOGA, et al.,	)
Defendants.	)
	)

ORDER

United States Magistrate William B. Mitchell Carter filed his report and recommendation pursuant to 2.8 U.S.C. § 636(b)(1) *and Fed. R. Cir. P.* 72(b) (Court File No. 89). Neither party filed an objection within the given ten (10) days.

After reviewing the record, the Court agrees with the magistrate judge's report and recommendation. The Court ACCEPTS and ADOPTS the magistrate judge's findings of fact, conclusions of law, and recommendations pursuant to

Section 636(b)(1) and Rule 72(b). Accordingly, the Court **ORDERS**:

Defendants' Motions to Enforce a Settlement Agreement is GRANTED (Court File Nos. 68, 72, 75, 80, and 83). Accordingly, the Clerk of Court is hereby **ORDERED TO CLOSE THIS CASE.**

SO ORDERED.

/s/ _____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
TENNESSEE AT CHATTANOOGA

Case No. 1:20-CV-385

[Filed February 11, 2004]

TONYA HARRIS,	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF CHATTANOOGA,	)
JUSTIN MCCOMMON, MARTIN PENNY,	)
CHRIS SMITH, DAVID ALLEN,	)
MARK SMELTZER, CHARLES KINSEY,	)
And CHRISTOPHER GAYNOR,	)
Defendants.	)
	)

REPORT AND RECOMMENDATION

I. Introduction

Defendants City of Chattanooga, Martin Penny. Chris Smith, David Allen, and Charles Kinney have filed Motions to Enforce a Settlement Agreement which have been referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B)&(C)

for a Report and Recommendation by the District Court (Court File Nos. 68, 72, 75, and 80). The undersigned Magistrate Judge shall also address in this report and recommendation defendants Justin McCommon's, Mark Smeltzer's and Christopher Gaynor's motion to enforce settlement (Court File No. 83).[1] This action arises from an incident occurring on December 26, 2001, involving defendants Justin McCommon, Martin Penny, Chris Smith, David Allen, Mark Smeltzer, Charles Kinsey, Christopher Gaynor, and plaintiff Tonya Harris' now deceased son, Torris Harris. At the time in question, all of the individual defendants were police officers with the Chattanooga Police Department. The plaintiff alleges that her son, Torris Harris, was subjected to an unlawful arrest and that the defendants used excessive force in arresting him resulting in Torris Harris' death. The plaintiff, as administratrix of Torris Harris' estate, seeks damages for the alleged violations of Torris Harris' civil rights pursuant to 42 U.S.C. §§ 1983 and 1985. All defendants in this case seek to enforce a settlement agreement which defendants assert have been reached with the plaintiff.

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[1] The District Court entered the Order of Referral on January 26, 2004. Subsequently, on January 28, 2004, defendants Justin McCommon, Mark Smeltzer, and Christopher Gaynor also filed a Motion to Enforce Settlement Agreement between the plaintiff and defendants (Court File No. 83). McCommon, Smeltzer, and Gaynor adopted and incorporated by reference into their motion the other defendants' motions to enforce contract of settlement. Even though the Order of Referral does not specifically refer this motion (Court File No 83) to the undersigned magistrate judge, because it concerns the same issue and requests the same relief as the other order referred by the District Court, the undersigned shall address this motion as well.

II.Relevant Facts

An evidentiary hearing was held on Monday, February 3, 2004, on defendants' motions to enforce the settlement agreement. The undersigned relies on the evidence adduced at this evidentiary hearing as well as the evidentiary materials accompanying the defendants' motions in preparing this recitation of facts.

While this particular claim has been pending in the United States District Court, plaintiff brought another cause of action in the Circuit Court of Hamilton County, Tennessee, against the same defendants arising from the same incident under Docket No. 02C-2227 (Affidavit of John Rice, ¶ 4, Court File No. 69). By letter dated December 18, 2003, the plaintiff's counsel, Atty. Robin Reuben Flores, sent by facsimile and by United States mail a letter to Phil Noblett, attorney for the City of Chattanooga (City), in this matter. The letter was entitled, "Acceptance of Offer to Settle" (See Exhibit I, Court File No. 69). The letter stated:

> As we discussed yesterday, December 17, via telephone, my client has accepted your offer on behalf of your client, The City of Chattanooga, to settle this matter for a sum of twenty-eight thousand five hundred dollars ($28,500.00). I assume that your client will also pay all court costs. I further assume that this amount will constitute a settlement of all claims associated with this matter, state and federal, present and future.

Id. The letter was copied to the plaintiff, Ms. Tonya Harris, and to Attys. Lee Davis, Johnny D. Houston, Jeffery Hollingsworth, and John T. Rice. Lee Davis represents Mark Smeltzer. Johnny D. Houston represents Christopher Smith.

Jeffery Hollingsworth represents David Allen. John T. Rice represents Charles R. Kinsey, and Phil Noblett represents the City of Chattanooga, Justin McCommon, Christopher Gaynor, and Martin Penny.

By letter dated December 18, 2003, City Attorney Phil Noblett wrote plaintiff's counsel, Robin Flores:

> Pursuant to our telephone conversation yesterday afternoon, this letter will confirm that your client has agreed to settle her claims against The City of Chattanooga and all other parties regarding the death of Torris Harris in the amount of $28,500.00. It is my understanding that this settlement will resolve all outstanding claims that your client has filed in federal court and in state court concerning this matter. Attached with this letter you will find, pursuant to our discussion, an Order of Dismissal for both lawsuits which will be filed in federal court and in Circuit Court and a Release of All Claims which I have prepared reflecting this settlement.

(Exhibit 2, Court File No. 69). A copy of this letter was sent to Attys. Lee Davis, Johnny D. Houston, Jeffery Hollingsworth, and John T. Rice. A proposed "AGREED ORDER OF DISMISSAL" for the state action and a proposed "AGREED ORDER" of dismissal for the federal action were enclosed in the letter. These proposed orders would dismiss with prejudice the entire causes of action in both state and federal courts as to all defendants *(See* Exhibits 3 and 4, Court File No. 69). Also enclosed with Mr. Noblett's letter was a proposed "RELEASE OF ALL CLAIMS" releasing and forever discharging all claims against the defendants in consideration of the sum of $28,500.00 (Exhibit 5, Court File No. 69). In his affidavit, Atty. Jeffery Hollingsworth, who

represents defendant David Allen, stated that Mr. Noblett sent him a letter on December 18, 2003, confirming the terms of the settlement agreement and confirming that all other parties were to be included in the proposed Release (Court File No. 77, ¶6).

By letter dated December 2, 2003, plaintiff's attorney, Robin Flores, wrote counsel for Charles Kinsey, John Rice, the following:

> As you probably are now aware, my client has accepted an offer to settle the cases in state and federal courts as to all defendants. I have notified my intended experts about this development. Thus, I believe the discovery issue is now moot. I assume that you will strike your motion to compel discovery responses. If I am wrong, please let me know.

The letter was copied to Tonya Harris (Exhibit 6, Court File No. 69).

By letter dated January 1, 2004, Arty. Flores wrote the City's counsel, Phil Noblett, to inform him that she (plaintiff) had rejected the $28,500.00 settlement offer:

> My client has reversed her position on her acceptance of your client's offer to "settle this matter for $28,500,00. She now rejects the offer and does not wish to sign the documents you forwarded to my office on December 18, 2003.
>
> Instead, she makes a counter-offer to settle for Seventy-five thousand dollars ($75,000.00), plus the funeral costs and expense [sic] and medical bills we have submitted to you.

> I am aware that you are now free to file a motion to enforce the settlement Ms. Harris has accepted. However, she now claims that she believed that she was accepting an offer of $100,000.00.

(Exhibit 7, Court Pile No. 69).

In his affidavit, Atty. Phil Noblett stated that he never made any settlement offer to Atty. Flores for $100,000.00 (Court File No. 74, ¶2). During the evidentiary hearing, plaintiff testified that she thought the $28,500.00 settlement was simply the first installment of a $100,000 settlement agreement. No evidence was produced, however, to the effect that any defendant, through counsel or otherwise, ever made a settlement offer of $100,000 though plaintiffs counsel did state that he had originally made a demand of the defendants for $100,000 to settle the case. The plaintiff also testified at the evidentiary hearing that she talked with her attorney three or four times before finally agreeing to the settlement agreement with the defendants.

Finally, on January 15, 2004, the plaintiff filed a motion for "enlargement of time for expert witness disclosures under F.R.C.P. 26 (Court File No. 70). In this motion, the plaintiff stated that she was requesting additional time to disclose her expert testimony and "[f]or cause, Plaintiff would show that the parties reached a settlement agreement on or about December 17, 2003, and that Plaintiff's counsel, in anticipation of the settlement, halted all work not associated with finalizing the settlement. Plaintiff would further show that she rejected the settlement in early January."

III. Discussion

A federal court has the inherent authority to enforce settlement agreements made in a case pending before it. *Re/Max International, Inc. v. Realty One, Inc.*, 271 F.3d 633, 654-46 (6th Cir.), *cert denied*, 535 U.S. 987 (2002); *Brock v. Scheuner Corp,*, 841 F.2d 151, 154 (6th Cir. 1988). Before enforcing a settlement, however, an agreement must have been met on all material terms. If an agreement has been met on all material terms, then the parties are bound by the agreement. *Re/MaxInternational, Inc.*, 271 F.3d at 645-46; *Brock*, 841 F.2d at 154. Finally, "when a client hires an attorney and holds him out as counsel representing him in this matter, the client clothes the attorney with apparent authority to settle claims connected with the matter.'" *Capitol Dredge and Dock Corp. v. City of Detroit*, 800 F.2d 525, 531 (6th Cir. 1986); *see also Noga v. Parts Associates, Inc.*, 2000 WL 178385 (6th Cir. Feb. 8, 2000) (same).

The evidence adduced in this case unequivocally indicates that the plaintiff hired Attorney Flores to act as her agent in pursuing her claim against defendants and later in negotiating a settlement of her Claims. Flores entered into an agreement with the defendants in which the material but simple terms of fine agreement were set: all plaintiff's claims against all defendants arising from her son's death on December 26, 2001, were released and waived for the sum of $28,500.00. There is no evidence to the contrary on that score even though the plaintiff herself testified she thought the $28,500.00 was simply a first installment of a settlement for $100,000. This mistaken understanding of the settlement amount apparently came from her own attorney's settlement demand, which was rejected, of $100,000.00.

IV. Conclusion

In summation, the plaintiff clothed her attorney with apparent authority to enter into a settlement on her behalf of all her claims against defendants in exchange for $28,500.00. Defendants are entitled to enforcement of this settlement. Accordingly, it is RECOMMENDED that defendants' motions to enforce the settlement agreement be GRANTED.[2]

/s/ _____
William B. Mitchell Carter
United States Magistrate Judge

---

[2] Any objections to this Report and Recommendation must be served and filed within ten (10) days after service of a copy of this recommended disposition on the objecting party. Such objections must conform to the requirements of Rule 72(b) of the Federal Rules of Civil Procedure. Failure to file objections within the time specified waives the right to appeal the District Court's order. *Thomas v. ALN,* 474 U.S. 140, 88 L.Ed.2d 435, 106 S. Ct. 466 (1985). The district court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive or general. *Mira v. Marshall,* 1106 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers,* 829 F.2d 1370 (6th Cir. 1987).

No. 05-863

In the Supreme Court of the United States

TONYA HARRIS,
AS ADMINISTRATRIX OF THE
ESTATE OF DECEDENT TORRIS HARRIS,
Petitioner,

v.

THE CITY OF CHATTANOOGA, TENNESSEE, ET AL.;
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PHILLIP A. NOBLETT
MICHAEL A. MCMAHAN
Counsel of Record
CITY ATTORNEY'S OFFICE
801 BROAD STREET, SUITE 400
CHATTANOOGA, TN 37402
(423) 757-5338

Counsel for Respondent
City of Chattanooga, Tennessee, et al.

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit Court of Appeals improperly exercised its supervisory power in a way that conflicted with Petitioner's right of due process by denying Petitioner's statutory right to appeal and/or arbitrarily applying its waiver rule and exceptions?

   A. Whether the Waiver Rule at issue was improperly applied?

   B. Whether Certiorari is warranted because the District Court committed "plain error?"

   C. Whether the actions of the Sixth Circuit, in reviewing this case, denied the Petitioner due process of law?

   D. Whether the Sixth Circuit acted contrary to the precedent of this Court in weighing the evidence presented at hearings and making factual findings consistent with the evidence in the record?

   E. Whether any split among the Circuits in applying exceptions to waiver rules, was previously recognized in *Thomas v. Arn*?

   F. Whether there was any arbitrary application of Sixth Circuit waiver exceptions in this case which would warrant any grant of certiorari?

LIST OF ALL PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all the parties involved in this matter.

The City of Chattanooga is a municipal corporation and has no parent companies or non-wholly owned subsidiaries required to be disclosed under Supreme Court Rule 29.6.

Defendants Martin Penney and Christopher Gaynor are individuals who were employed at various times by the City of Chattanooga in their capacity as police officers. At the time of this incident, defendant Gaynor was a ride-along and was not employed by the City of Chattanooga.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full-text publication. The full opinion of the Sixth Circuit is attached as Appendix B to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondent, City of Chattanooga, adopts and incorporates the Statements of Jurisdiction set forth in the Petition for Writ of Certiorari filed by Petitioner, TONYA HARRIS, as Administratrix of the Estate of Decedent Torris Harris.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Respondent City of Chattanooga adopts and incorporates the Constitutional provisions, treaties, statutes, ordinances and regulations involved set forth in the Petition for Writ of Certiorari filed by Petitioner, TONYA HARRIS, as Administratrix of the Estate of Decedent Torris Harris.

STATEMENT OF THE CASE

On December 26, 2002, plaintiff filed a Complaint against the City of Chattanooga, five City of Chattanooga police officers, and two private citizens pursuant to 42 U.S.C. § 1983. On November 14, 2003, Appellant's former counsel, Attorney Robin Ruben Flores, made a demand to the City of Chattanooga to settle the case for $100,000.00.

On December 17, 2003, Attorney Phillip A. Noblett, attorney for the City of Chattanooga and Martin Penny, and Attorney Flores engaged in settlement negotiations and reached the settlement agreement to release all claims for $28,500.00. On December 18, 2003, Flores sent by facsimile a letter to Phil Noblett. The letter is entitled "Acceptance of Offer to Settle" and states as follows:

> Thank you for your attention to this case. As we discussed yesterday, December 17, via telephone, **my client has accepted your offer** on behalf of your client, the City of Chattanooga, **to settle this matter for a sum of twenty-eight thousand five hundred dollars ($28,500.00)**. I assume that your client will also pay all court costs. I further assume that this amount shall constitute a settlement of all claims associated with this matter, state and federal, present and future. (Emphasis supplied).

This letter was copied to Ms. Tonya Harris, and to other attorneys of record: Lee Davis, Esq., Johnny Houston, Esq., W. Jeffrey Hollingsworth, Esq., John T. Rice, Esq.

On December 18, 2003, Noblett sent the following letter to Flores:

> Pursuant to our telephone conversation yesterday afternoon, this letter will confirm that your client has agreed to settle her claims against the City of Chattanooga and all other parties regarding the death of Torris Harris in the amount of $28,500.00. It is my understanding that this settlement will resolve all outstanding claims that your client has filed in federal court and in state court concerning this matter. Attached with this letter you will find, pursuant to our discussion, an Order of Dismissal for both lawsuits which will be filed in federal court and in Circuit Court and a Release of All Claims which I have prepared reflecting this settlement.

Thereafter, the Petitioner sought to revoke her acceptance of the settlement offer. On or about January 1, 2004, Petitioner's counsel sent a letter which stated: "My client has reversed her position on her acceptance of your client's offer to settle this matter for $28,500. She now rejects the offer and does not wish to sign the documents you forwarded to my office on December 18, 2003. . . . I am aware that you are free to file a Motion to Enforce the Settlement Ms. Harris has accepted."

The Respondent and other defendants to the action then filed various motions to enforce the settlement. The District Judge referred the motions for an Order to Enforce the Contract of Settlement to the Magistrate Judge on January 26, 2004. The hearing regarding the motions to enforce settlement agreement was held on February 3, 2004 before the Magistrate Judge. On February 11, 2004, the Magistrate Judge entered his Report and Recommendation in which he recommended that the defendants' motions to enforce settlement agreement be granted. On March 3, 2004, the

District Judge adopted the Report and Recommendation of the Magistrate Judge and terminated the case.

Appellant filed a letter dated March 23, 2004, more than ten (10) days after the Order entered by the District Court Judge which also was treated as a *pro se* Motion for Reconsideration. This letter states that on March 12, 2004, Appellant terminated the employment of Attorney Flores. Attorney Flores was eventually allowed to withdraw on April 8, 2004 by Order of the Magistrate Judge. The Plaintiff/Appellant's Motion for Reconsideration also requested that the District Court Judge set aside his March 3, 2004 Order adopting the Magistrate's Report and Recommendation. On April 2, 2004, Plaintiff/Appellant Tonya Harris filed her Notice of Appeal to the Sixth Circuit Court of Appeals. On the same day, the Plaintiff/Appellant filed her Application to Proceed in Forma Pauperis.

On May 14, 2004, the District Court Judge entered an Order granting Attorney Flores' Motion to Declare Attorney Lien, denying the Defendants' Motion for Reconsideration, rejecting the Defendants' objections to the Magistrate's Order of April 8, 2004, granting the defendants leave to deposit funds in the Court, and granting the plaintiff application to proceed *in forma pauperis*. The District Court Judge also entered a Memorandum detailing his reasoning behind such decisions. This Memorandum and Opinion of the District Judge was not attached to the Petition. A copy of the Memorandum and Opinion and Order of the District Court Judge is attached to this Brief in Opposition as Appendix 1 and 2.

The Sixth Circuit Court of Appeals affirmed the ruling of the District Court on June 15, 2005, and clearly found that the plaintiff's failure to timely object to any matters in the

Magistrate Judge's Report and Recommendation constituted a waiver of these issues on appeal. On September 29, 2005, the Sixth Circuit entered an Order concluding that no rehearing *en banc* should issue and denying a petition for rehearing *en banc*.

REASONS WHY THE PETITION SHOULD BE DENIED

None of the criteria set forth in Supreme Court Rule 10 that could establish a "compelling reason" to grant the petition is present here. Petitioner has failed to identify any way in which the Sixth Circuit's decision either:

1. conflicts with the decision of another United States Court of Appeals,

2. decides an important federal question in a way that conflicts with the decision by a state court of last resort,

3. so far departs from the accepted and usual course of judicial proceedings to justify an exercise of this Court's supervisory power,

4. decides an important question of federal law previously undecided by the Court, or,

5. conflicts with relevant decisions of this Court.

Supreme Court Rule 10 specifically provides that a petition for writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The petition for writ of certiorari to this Court in this case is nothing more

than a claim by Petitioner that the Sixth Circuit failed to follow its own procedural rule on waiver of appeal pursuant to 28 U.S.C. § 636(b)(1)(B) adopted in *United States v. Walters*, 638 F.2d 947, 949-950 (6th Cir. 1981) and affirmed by the decision of this Court in *Thomas v. Arn*, 474 U.S. 140 (1985).

This case involves an alleged failure of the District Judge and the Court of Appeals to consider an untimely objection to the report and recommendation of a magistrate that enforced a settlement agreement between the parties. This case is not suitable for review because the Sixth Circuit did not misapply any rule of law which is otherwise appropriate for review based on Supreme Court Rule 10.

This Petition for Certiorari is premised upon an alleged arbitrary application by the Sixth Circuit of this Court's opinion in *Thomas v. Arn*. Pursuant to the doctrine of *Thomas v. Arn,* a Court of Appeals may adopt a rule conditioning an appeal when taken from a district court judgment that adopts a magistrate's recommendation. The rule adopted by the Sixth Circuit requires a timely filing of objections to the magistrate's recommendation with the district court. The Sixth Circuit did not under the facts of this case waive the timely filing of objections to the magistrate's recommendation and consider other legal arguments raised for the first time on appeal.

Petitioner also claims that the Sixth Circuit should have waived the application of this rule "in the interest of justice" - a matter involving the exercise of judicial discretion.